upreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1996

ABBE BERSHATSKY,

*Petitioner,*

*vs.*

WILBUR A. LEVIN, Commissioner of Jurors, Kings County, New York and his successors in office,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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52 pp

## QUESTIONS PRESENTED

1. Whether the court below erred in ruling that the selection of jurors from voter registration lists violates neither Article I, Section 4, the Fourteenth Amendment, nor the Twenty-fourth Amendment of the United States Constitution nor 42 U.S.C. § 1973i, by penalizing people for voting in federal elections.

2. Whether the court below erred in ruling that there is not a reasonable alternative to selecting jurors from voter registration rolls in order to maintain a jury system, one which significantly reduces the number of people penalized for voting without reducing the pool from which venires are selected.

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Petitioner, Abbe Bershatsky ("Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, initially decided November 8, 1996, entered in this proceeding, after a petition for rehearing, on January 27, 1997.

## OPINIONS BELOW

All decisions, orders, and judgments are reported as *Bershatsky v. Levin*. The Order of the Court of Appeals is reported at 99 F.3d 555 and appears as Appendix A to this petition. The Memorandum and Order of the district court is reported at 920 F. Supp. 38 and appears as Appendix B. The denial of the petition for rehearing is not reported and appears as Appendix C.

## STATEMENT OF JURISDICTION

The Order of the Court of Appeals, State of New York, was initially decided on November 8, 1996, and was entered in this proceeding, after a petition for rehearing, on January 27, 1997. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C § 1973i(b) provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten or coerce or attempt to intimidate, threaten or coerce any person for voting or attempting to vote,

Relevant provisions of the United States Constitution (Article I, § 4, Paragraph 1; Article VI, Paragraph 2; the Sixth Amendment, § 1, Sentence 2; the Fourteenth Amendment; and the Twenty-fourth Amendment, Section 1); New York Statutes (Civil Practice Law and Rules, § 4105; Criminal Procedure Law, § 270.15, part 2, last two sentences; Election Law, § 5-400, 1; and Judiciary Law § 506); and 28 C.F.R. Appendix to Part 51 are set forth in Appendix D.

## STATEMENT OF THE CASE

Petitioner, Abbe Bershatsky, a citizen of the United States and of the State of New York, where she resides and where she is registered to vote, received a juror questionnaire from the respondent, Kings County Commissioner of Jurors ("the Commissioner"), Wilbur A. Levin, with a notice that her name had been selected at random from three lists, one of which is the Board of Elections Voter Registration List. She duly completed and returned the questionnaire timely. On or about September 26, 1995 she received a notice summoning her to report on October 16, 1995. No extension was granted beyond that date.

The procedure for selecting venire people is selection of names at random from several lists, one of which is the Board of Elections Voter Registration List. The Commissioner of Jurors does not eliminate duplications from the several lists. Kings County, where Ms. Bershatsky lives, is a county in which less than half of the voting aged citizens vote.

On October 11, 1995 Ms. Bershatsky filed a complaint in the United States District Court for the Eastern District of New York, demanding a declaratory judgment that unless the Commissioner proves to the court that her selection for jury duty was from a source other than voter registration rolls such

selection is void. Subject matter jurisdiction over this claim was proper under 28 U.S.C § 1331. She also requested provisional remedies at that time. There was no trial nor other fact finding. The Commissioner submitted a motion for summary judgment. Ms. Bershatsky submitted a memorandum of law in opposition to it, claiming that the Commissioner's practice illegally penalized her for voting in federal elections, *citing, inter alia, Harper v. Virginia Board of Elections; Oregon v. Mitchell*; *Reynolds v. Sims*; *Shelton v. Tucker*; *Southern Pacific Co. v. Arizona*; Twenty-fourth Amendment of the Constitution; 42 U.S.C. § 1931i(b); and 28 C.F.R. Appendix tc Part 51 to argue the same points for which they are presented in "Reasons for Granting the Writ". District Judge David G. Trager granted summary judgment for the Commissioner, on the grounds that although a citizen's right to vote is fundamental, governments have a compelling need to adopt jury selection systems based on voter lists. The United States Court of Appeals for the Second Circuit, on appeal, affirmed on the same grounds, calling to the jury-pool selection method the most effective means of achieving its end. The citations and arguments mentioned above as having been made before the District Court had also been made in the brief presented timely to the Court of Appeals.

Other facts of the case which might be considered relevant are as follows: (1) More people go to the polls because of federal elections than for other elections; (2) In New York more people serve jury duty in state and local courts than in federal courts; (3) Serving jury duty is economically disadvantageous to people; (4) Ms. Bershatsky works for wages. Her work hours include jurors' hours. She lives alone with her elderly father. It takes less time for her to get to their home from her place of work than it takes to get to their home from the place of jury service. She can be reached quickly by telephone at her place of work and could give him assistance in an emergency; (5) The questionnaire sent to her by respondent asks if she is a

citizen of the United States; (6) She had voted in at least one federal election in the four year period preceding the jury questionnaire being sent to her; (7) She files New York State personal income tax returns.

The facts given above were either alleged in the complaint or are reasonably inferable from other facts alleged in the complaint. Those that were not explicitly alleged were stated in the brief to the Court of Appeals to be reasonably inferable from other facts alleged in the complaint, except for "other fact (7)". The Court of Appeals expressed no reservations as to those inferences.

## REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals should be reversed at least on the narrow grounds that if duplications were eliminated from jury sources, venire panels would be more inclusive yet fewer voters would be penalized. By using a "most effective means" test, which clearly conflicts directly with this Court's *Shelton v. Tucker* test, the court below was able to ignore those points. (As long as duplications are eliminated the only voters penalized are those who are on none of the other sources.)

Three separate points of law, supported by decisions of this Court, independently indicate that, facially, the practice of discouraging people from voting by selecting people for jury duty if they vote is illegal under federal law. Abbe Bershatsky, like the millions of other New York voters, has the right to have the same probability of being compelled to serve jury duty as if she did not vote in federal elections. It is so clear that the court below should be reversed, at least on the narrow grounds of failure to eliminate duplications, that it can be reversed without oral argument.

The opinion of the Second Circuit should be reversed on wider grounds, to better protect the rights of Ms. Bershatsky. In the case of a state's effort to get a representative cross-section of citizens selected for jury duty, several reasonable alternatives are available. The best alternative is to choose people completely from sources other than voters' roles. (Note that telephone service is not limited to the affluent to the extent it was in the earlier part of the century.) In the future, New York might eliminate duplications in lists of potential jurors, so a narrow protection of voters' rights is not appropriate. Also, if she now or ever appears on none of the alernative lists she should not, by voting, become a candidate for jury duty while a similarly situated citizen who does not vote is not a candidate for jury duty.

Before the brief for this case was filed with the Second Circuit that court cited the opinion of the Eastern District in this case, giving the appearance of prejudging this case.

The question is important. Special importance attaches to the electoral franchise, as noted in Point II (B). Yet people, mainly poorer workers and those who have small businesses, can be discouraged from voting by the practice of selecting people for jury duty if they vote. Over five percent of eligible voters who refrain from voting give desire not to be called for jury duty as a reason for not voting, according to two polls, as noted in Point II (A). They should not be subject to any greater probability of being called to jury duty if they vote than if they did not vote.

The dollar value of Petitioner's time is not very great by Supreme Court standards for commercial cases but it exceeds the twenty dollars in fines overturned in *Thompson v. City of Louisville*, 362 U.S. 199, 202 (1960), and the ten dollar fine overturned in *Boynton v. Virginia*, 364 U.S. 454, 456 (1960). (Even court costs exceed that amount.)

## I.

## THE OPINION OF THE COURT OF APPEALS SHOULD BE REVERSED AT LEAST ON THE NARROW GROUNDS THAT IF DUPLICATIONS WERE ELIMINATED FROM JURY SOURCES, VENIRE PANELS WOULD BE MORE INCLUSIVE YET FEWER VOTERS WOULD BE PENALIZED.

### A. "The Most Effective Means" Test Of The Court Of Appeals Clearly Conflicts Directly With This Court's *Shelton v. Tucker* Test, As Does Its Corollary, "Overinclusiveness".

The court below upheld the governmental practice because it is "the most effective means of pursuing the compelling interest of achieving a reasonably representative venire." When two constitutional principles oppose each other, *Shelton v. Tucker,* 364 U.S. 479 (1960), said that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that *broadly* stifle fundamental personal liberties when the end can be more narrowly achieved." (Emphasis added.) *Dunn v. Blumstein*, 405 U.S. 330, 343, 31 L. Ed. 2d 274, 284, 285 (1972), said ". . . a heavy burden of justification is on the State, [and the] statute will be closely scrutinized in light of its asserted purposes." Even when health is involved the principle of possible alternatives apply. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). It would ignore reality to assert that the anti-littering ordinance stricken in *Schneider v. State,* 308 U.S. 147 (1939) was not "the most effective means" of accomplishing its purpose, but the other possible means were better to resolve the conflict. Of course, under the present system, any alternatives used in addition to voter registration lists for selection of prospective jurors do not remove completely the fact that voter registration can lead to jury duty because, whether or not a person is on another list,

being registered to vote adds to the probability of being chosen for jury duty.

While alternative lists include significant numbers of non-citizens, this is relevant only to the convenience of the Commissioner and thus concern for it is also contrary to the *Shelton* test. They can be readily eliminated in the jury selection process. In fact, the quetionnaire sent to Ms. Bershatsky by the Commissioner asks if she is a citizen of the United States, as noted in the Statement of the Case. The voting list also is overinclusive, since New York's Judiciary Law, § 510 requires a proficiency in the English language, which is not a requirement for voters.

**B. Not Only Does The State Practice Fail To Meet This Court's *Shelton v. Tucker* Test, If Voter Lists Were Retained As A Source But Duplications Were Eliminated From Jury Sources, Venire Panels Would Be More Inclusive (Especially If More Sources Were Added) Yet Fewer Voters Would Be Penalized.**

There is one other alternative that clearly is more representative and satisfies the *Shelton v. Tucker*, 364 U.S. 479 (1960), *supra*, test. The jury pool is fairer, the more sources, including voter lists, are used. As long as duplications are eliminated the only voters penalized are those who are on none of the other sources. Since New York law does not provide for elimination of duplication it is unconstitutional on its face. Since the law is not separable, if any voter is called for jury duty under the present New York statutes and, before serving, *demands* not to serve, on the grounds of voting rights, that call to jury duty must be cancelled unless New York shows that that voter's name was selected from a source other than voters' lists. (On separability, generally, *see Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Ives v. South Buffalo Ry. Co.*, 201 N.Y.

271 (1911), and *Fougera & Co. v. City of New York*, 224 N.Y. 269 (1918). On prior interpretations of Judiciary Law, § 506 and voters' rights *see Marcus v. Levin*, 198 A.D. 2d 214, 603 N.Y.S. 2d 323 (1993), *app. dism'd*, 83 N.Y. 2d 847, 612 N.Y.S. 2d 109, *cert. denied*, 115 S. Ct. 169, in which the Court of Appeals dismissed an appeal on the grounds that the issue presented here is not a substantial constitutional issue.) At a minimum, there is a factual question as to whether Ms. Bershatsky is on another list.

Some possible sources are taxpayers, licensed automotive drivers, people listed in telephone directories, volunteers (perhaps responding to public service announcements), recipients of welfare and unemployment benefits, and licensed vehicle owners, all of which are specifically authorized under New York's Judiciary Law, § 506 (though not necessarily used), and students, people accused of driving without a license, and real property owners, *plus voter lists*. Every source added would improve the mix and not detract from representativeness of the mix. Welfare recipients and income tax payers are each included once. As long as duplications are effectively eliminated any other list added would increase the total number of people included with, diminished fear of being underrepresentative.

In any event, Ms. Bershatsky should not be given the burden of either proving the adequacy of the alternatives or even rebutting factually any offers of proof by the Commissioner. In other cases of alternatives in which state or local government did attempt alternatives this Court simply found the state or local laws unconstitutional.

**C. The Recognition Of The Illegality Of The Respondent's Practice Would Not Affect Prior Jury Trials, Since Juries Need Not Mirror The Community, According To Several Decisions Of This Court, Two Of Which Were Cited But Misread By The Court Of Appeals.**

The court below, in support of its holding, cited two decisions that uphold jury selections against the claim that they do not sufficiently represent the community. By narrowly interpreting the degree of community representation required in juries, these cases argue against the Commissioner's position. The cases are *Taylor v. Louisiana,* 419 U.S. 522, 538 (1975) (saying ". . . we impose no requirement that petit juries actually chosen must mirror the community . . ."), and *Lockhart v. McCree,* 476 U.S. 162 (1986), in which the Court reinstated a conviction, saying (at page 174) ". . . groups defined solely in terms of shared attitudes that would . . . substantially impair members . . . from performing one of their duties . . . are not 'distinctive groups' for fair-cross-section purposes," even though that duty (deciding after conviction, if the death penalty was to be imposed) was not to be performed by the jury in question. In *Akins v. Texas,* 325 U.S. 398, 65 S. Ct. 1276 (1945), some people were disqualified who would not have been if they had owned real property. (*See* qualification 2 of the applicable statute law, quoted at footnote 3 of the decision, at page 402 (page 1279 of Supreme Court Reports).) That decision said "Fairness of selection has never been held to require proportional representation of races upon a jury." (*Tollett v. Henderson,* 411 U.S. 258, 262 (1973) and *Patton v. State of Mississippi,* 332 U.S. 463, 466, 92 L. Ed. 76, 79 (1947) modify *Akins* without detracting from the principle of *Akins.*) *See also Fay v. New York,* 332 U.S. 261, 284, 67 S. Ct. 1613, 1626 (1947) and *Brown v. Allen,* 344 U.S. 443 (1953). *Carter v. Jury Commission,* 396 U.S. 320, 330 (1970) notes (at page 329) that juries need not have proportional representation. At pages

327 and 328 of *Carter* we see the juries were very far from proportional. Blacks in 1967 were 32% of potential voters, compared to an estimated 65% of the population.

In none of the cases concerning conflict of constitutional principles has any state's violation of one principle been found justified by another principle. The "heavy burden of justification [that] is on the State" per *Dunn v. Blumstein*, 405 U.S. 330, 343, 31 L. Ed. 2d 274, 284, 285 (1972), *supra*, is impossible to meet because of the rule of *Akins v. Texas*, 325 U.S. 398, 403, 65 S. Ct. 1276, 1279 (1945), *supra*. If one person is erroneously but accidently omitted from the jury roles that is not grounds for voiding court proceedings. Any accidental skewing of a panel is compensated for by the requirement that jurors who would allow their prejudices to influence their decisions are ineligible to sit. *See* Civil Practice Law and Rules § 4105 and part 2 of Criminal Procedure Law § 270.15. But all voters are allowed to vote their prejudices and it has never been suggested that it is proper to illegally disenfranchise some voters as long as the number is not too great. Thus, after people are called for jury duty, the jury selection process should alleviate the effect of any racial imbalance, by disqualification for cause. Furthermore, in NewYork some imbalances of juries cannot be aggravated by peremptory challenges of either a prosecutor, a criminal defendant, or a litigant. (*See Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Kern*, 75 N.Y. 2d 638 (1990); and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419 (1994), respectively.)

The cases say that the constitutional guarantee of a fair jury trial is not violated by selecting jurors from lists that are not the most representative. That is not inconsistent with the proposition that the constitutional right to vote is violated by selecting jurors from voting lists. To say it is inconsistent is like saying if every bear is a mammal then every mammal is a bear. New York jurors

are disqualified if they say they will vote their prejudices in the jury room, but voters have the right to vote their prejudices. *See Dunn v. Blumstein,* 405 U.S. 330, 343, 31 L. Ed. 2d 274 (1972).

The thought may occur that finding for the petitioner may invalidate previous jury trials in other cases. The above shows this is not so. Furthermore, the Court can adopt the rule in *United States v. Huber,* 457 F. Supp. 1221, 1232 (S.D.N.Y. 1978), *supra,* determined when the defendant argued that he could stand in the shoes of the possible jurors. The court rejected that argument, in part because the *right* of these people to serve on a jury was not as significant as their right to vote.

**D. Three Separate Points Of Law, Supported By Decisions Of This Court, Independently Indicate That, Facially, The Practice Of Discouraging People From Voting By Selecting People For Jury Duty If They Vote Is Illegal.**

*1. States May Not Interfere In Federal Elections Without Specific Congressional Authorization.*

Article I, Section 4 of the Constitution empowers Congress to impose limits on the states as to setting voter standards for federal elections, according to *Oregon v. Mitchell,* 400 U.S. 112 (1970). Nothing in the Constitution authorizes state officials to interfere with the voting of those who qualify. In *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945), *supra,* the Court said the mere existence of the congressional power in a field denies the states the power to interfere in that field without specific congressional authorization in the case of interstate commerce, saying at page 767 "This . . . is predicated upon the implication of the commerce clause itself . . . or . . . the presumed intention of Congress, where Congress has not spoken. . . . " Similarly, the Court should rule that the jury duty practice is

illegal because it substantially impedes voting in federal elections. Voting in federal elections keeps citizens on the voters' registration lists whether or not they vote in state and local elections. (Election Law, § 5-400.) We contend, also, that many more people serve state jury duty than federal while more people go to the polls because of federal elections than for other elections. Under the rule of *Dunn v. Blumstein*, 405 U.S. 330, 343, 31 L. Ed. 2d 274 (1972), *supra*, a state law is unconstitutional if it penalizes someone for exercising a right even if it does not deter exercising it.

*2. The Constitution's Equal Protection Clause Forbids Discrimination Against The Poor In Voting.*

In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *supra*, the Court held that payment of a $1.50 tax could not be a precondition for voting in a state election. The Court said at page 666: "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of a fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." At page 668 it said "[a citizen's right to vote is] the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay." Clearly, subjecting voters to the possibility of loss of their regular wages creates no less an invidious distinction based on wealth than does a $1.50 poll tax. The principle of protection for the poor was expanded in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996). Furthermore, the Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), stated that "the fundamental principle of representative government in this country is one of equal

representation for equal numbers of people, without regard to race, sex, *economic status*, or place of residence within a State." (Emphasis added.)

*3. The Twenty-Fourth Amendment Bars The State Practice.*

The Twenty-fourth Amendment to the United States Constitution forbids the abridgment of any citizen's right to vote in federal elections by any state by reason of failure to pay any poll tax or other tax. "The American College Dictionary", published by Random House in 1956, gives as the first two definitions of "tax" "a payment of money or performance of services for the use of the government or the benefit of the public" and "a burdensome charge, obligation, duty, or demand." In constitutional construction we must not give words their narrowest possible construction. *Gibbons v. Ogden*, 9 Wheat. 1 (U.S. S. Ct. 1824). Therefore, Judiciary Law, § 506 is barred by this Amendment. *See also Harman v. Forssenius*, 380 U.S. 528 (1965) and *Gray v. Johnson*, 234 Fed. Supp. 743 (S.D. Miss. 1964).

## II.

## THE OPINION OF THE SECOND CIRCUIT SHOULD BE REVERSED ON WIDER GROUNDS, TO BETTER PROTECT THE RIGHTS OF MS. BERSHATSKY.

### A. Voter Lists Are Not Representative In Kings County, Where Less Than Half Of The Voting Age Citizens Vote.

Voter lists are not representative in Kings County for several reasons, one being that voting is so low in Kings County. It is reasonable to infer that Kings County is a county in which less than half of the voting age citizens vote. (*See* "Statement of the Case", second paragraph.) Official statistics show that in

Kings County less than half of the voting age citizens vote. 28 C.F.R. Appendix to Part 51. Judge Gewin, writing on behalf of a Committee on the Operation of the Jury System, as reported in *United States v. Cecil,* 836 F.2d 1431, 1447 (4th Cir.), *cert. denied,* 487 U.S. 1205 (1988) notes ". . . the unlikelihood that a registration list containing only half the eligible voting age population could produce a fair cross section."

There is other evidence that the New York practice not only penalizes voting but also makes juries less representative than the ideal. A significant number of people exercise their option not to vote in order to reduce the likelihood of jury duty, according to polls conducted by Eagleton Poll, "Electoral Participation and Non-participation in New Jersey", 1981, Eagleton Institute of Politics, Rutgers University, New Brunswick, New Jersey, 08901 and the Los Angeles Times January 9, 1977, Part One, Page 1, Column 3 (*see* Appendix E and F), both cognizable by the Court, per *Muller v. Oregon,* 208 U.S. 412, 421 (1908), perhaps because it is extremely unlikely that any election will be decided by a single vote (especially in politically monolithic Kings County). Blue collar workers and poorer workers are more likely to suffer economically from jury duty and would therefore be more likely not to vote.

**B. If Conflicting Constitutuional Rights Had To Be Weighed Against Each Other, Voting Rights Must Prevail, Per Several Opinions Of This Court.**

Conflicting constitutional rights need not be weighed against each other, since the goal of fair juries "can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479 (1960), *supra.* However, if they had to be weighed, voting rights must prevail because of its superior position and because juries need not mirror the community, as noted in Point I (C). So, if underinclusiveness of alternative lists without voter lists had been proven it would be irrelevant.

Special importance attaches to the electoral franchise. In *Reynolds v. Sims*, 377 U.S. 533 (1964), *supra*, the Court said "Especially since the right to exercise the franchise in a free and *unimpaired* manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (Emphasis added.) In *Baker v. Carr*, 369 U.S. 186 (1962), another malapportionment case, Justice Clark of the Supreme Court noted that "the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government." In *Wesberry v. Sanders*, 376 U.S. 1, 17, 11 L. Ed. 2d 481 (1964), the Court said "other rights, even the the most basic, are illusory if the right to vote is undermined." Other cases that note the special importance of the electoral franchise are *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (whose holding is restricted by *Ball v. James*, 451 U.S 355 (1981) in a way irrelevant to our general question), *Hill v. Stone*, 421 U.S. 289 (1975), *Dunn v. Blumstein*, 405 U.S. 330 (1972), *supra*, (at page 336) and cases cited there, *Kusper v. Pontikes*, 414 U.S. 51 (1973), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

**C. The Second Circuit Differs From Two Cases Outside Their Circuit By Narrowly Interpreting 42 U.S.C. § 1973i, Subsection (b).**

42 U.S.C. § 1973i, subsection (b) provides "No person, whether acting under color of law or otherwise, shall intimidate, threaten or coerce . . . any person for voting . . .", making it illegal for a state official to use voter registration rolls as a source of names for jury duty. If the voter called by the state relies on income from a daytime job and that income stops, this economic hardship constitutes "coercion" under the federal statute. In addition, some workers have no job security, so they may fear they will find their job given permanently to their replacement

when they finish jury duty. (Judiciary Law, § 519 attempts to prevent such discharge, but it does not require employers who violate the law to pay attorneys' fees of successful plaintiffs.) This situation certainly discourages some people from voting. It follows from this that federal statutory law makes it illegal for a state official to use voter registration rolls as a source of names for jury duty. By narrowly interpreting 42 U.S.C. § 1973i, subsection (b), the Second Circuit differs from two cases outside their circuit. *See Jackson v. Riddell*, 476 F. Supp. 849 (N.D. Miss. 1979) and *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968), in different contexts.

**D. Finding Federal Jury Selection Legislation Relevant To The Instant Case Is Contrary To Holdings Of This Court.**

The opinion below refers to congressional preference for voter registration lists as a source for prospective jurors shown in 28 U.S.C. § 1863(b)(2) (1992). If the intended import is that the state law is impliedly approved by parallel federal law, that is contrary to *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82. If the import is that the state legislation cannot be found contrary to the Constitution without finding the federal procedures unconstitutional, that, too, is unfounded. There are several grounds for distinguishing the two. One such ground lay in an argument that does not apply to federal legislation, namely the one concerning *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), *supra. See also* "other facts" (1) and (2) and Election Law, § 5-400 which indicate that the New York tail is waving the national dog.

Federal law requires states to offer jury trials to criminal defendants. The requirement does not stem from Amendment VI, since the Bill of Rights does not apply to the states. *Barron v. The Mayor and City Council of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833). However, Amendment XIV does impose that

requirement. *Duncan v. Louisiana*, 391 U.S. 145 (1968). That imposition is less strict than Amendment VI's requirements for grand and petit juries. *See* the opinion of Justice Powell in *Apodaca v. Oregon*, 406 U.S. 404, 32 L. Ed. 2d 184, which was necessary to the result.

Also, *Reynolds v. Sims*, 377 U.S. 533 (1964), *supra*, relies on *Baker v. Carr*, 369 U.S. 186 (1962), *supra*, which relies on the Supremacy Clause of Article VI. There is another possible distinction. I can find no case, either way, as to whether states' due process requirements are greater than that of the federal government because the former is specified in the Fourteenth Amendment while the latter is merely implied by the Fifth Amendment.

**E. The Application Of *United States v. Cecil* To This Case, Which Arises In A County Where Less Than Half The Eligible Voters Vote, Is Contrary To A Holding Of The Fifth Circuit, Wording Of The *Cecil* Court, Itself, And Reason.**

In *Broadway v. Culpepper*, 439 F.2d 1253 (5th Cir. 1971), a lower court was mandated to correct the inadequacy of the number of people available for jury duty because 40% of those eligible were not in the pool (because unanswered questionnaires were not followed up). *United States v. Cecil*, 836 F.2d 1431 (4th Cir.) *cert. denied*, 487 U.S. 1205 (1988), *supra*, quotes approvingly Judge Gewin, writing on behalf of a Committee on the Operation of the Jury System, who notes " . . . the unlikelihood that a registration list containing only half the eligible voting age population could produce a fair cross section", as noted in Point II A. Since less than half of eligible voters vote in Kings County, according to 28 C.F.R. Appendix to Part 51, the Second Circuit's decision is contrary to those sensible sources. In this case the Second Circuit supported its decision with citations of cases, including *United States v. Cecil*,

836 F.2d 1431 (4th Cir.), *cert. denied*, 487 U.S. 1205 (1988), *supra*, and *United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993), that rejected arguments that juries in federal courts were improper because of the use of voter lists. Using these authorities here is inconsistent with the holding of *Broadway v. Culpepper*, 439 F.2d 1253 (5th Cir., 1971), *supra*, and Judge Gewin's dictum. *United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993), *supra*, in holding a 20% racial disparity irrelevant is contrary to *United States v. McDaniels*, 509 F.2d 825 (5th Cir. 1973), *cert. denied*, 423 U.S. 857.

More relevant to the issue involved when any person objects to being called to jury duty because of voting is the finding in *United States v. Huber*, 457 F. Supp. 1221, 1232 (S.D.N.Y. 1978), *supra*, when the defendant argued that he could stand in the shoes of the possible jurors and the court rejected that argument, in part because the right of these people to serve on a jury was not as significant as their right to vote. (The test for protection of voters is more rigorous than the test for selecting venire people, at least with respect to practices that were not intended to be discriminatory. 42 U.S.C. § 1973 prior to its 1982 amendment simply forbade states and localities to deny or abridge voting rights "on account of race or color." Subsequent legislation, Voting Rights Act Amendment of 1982, broadened the law to forbid procedures that result in diminished opportunities for members of any race to elect representatives regardless of intent. Even without the 1982 amendment, by federal law intent is irrelevant to some governmental action regarding voting in Kings County because of the degree of non-voting and non-registration by voting age citizens there. 28 C.F.R. Appendix to Part 51, *supra*; *Rome v. United States*, 446 U.S. 156 (1980).) None of these cases uphold the right of a state to burden persons with the obligation of jury duty as a result of their voting.

## III.

**BEFORE THE BRIEF FOR THIS CASE WAS FILED WITH THE SECOND CIRCUIT THAT COURT CITED THE OPINION OF THE EASTERN DISTRICT IN THIS CASE, GIVING THE APPEARANCE OF PREJUDGING THIS CASE.**

In a per curiam decision, dated March 8, 1996, the Second Circuit, in *Schanbarger v. Macy*, 77 F.3d 1424 (2d Cir. 1996), cited the opinion of the Eastern District in this case, before May 31, 1996, the date the brief for this case was timely filed with the Court of Appeals. This gave the appearance of prejudging this case. This was especially damaging since the District Court failed to allude to many arguments made in Ms. Bershatsky's brief.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision and order of the Court of Appeals in this matter.

Respectfully submitted,

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*Attorney for Petitioner*
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## APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 8, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 380 August Term, 1996

(Argued: October 30, 1996 Decided: Nov. 8, 1996)

Docket No. 96-7238

ABBE BERSHATSKY

*Plaintiff-Appellant,*

- v. -

WILBUR A. LEVIN, Commissioner of Jurors, Kings County, New York and his successors in office,

*Defendant-Appellee.*

Before: KEARSE, WALKER, and JACOBS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, David G. Trager, *Judge,* dismissing complaint alleging that selection of potential jurors from voter registration lists is an impermissible burden on the right to vote.

Affirmed.

*Appendix A*

DONALD MARCUS, Brooklyn, New York, *for Plaintiff-Appellant.*

RICHARD J. CARDINALE, Assistant Attorney General, New York, New York (Dennis C. Vacco, Attorney General of the State of New York, Victoria A. Graffeo, Solicitor General, Thomas D. Hughes, Assistant Solicitor General, New York, New York, on the brief), *for Defendant-Appellee.*

*Per Curiam:*

Plaintiff Abbe Bershatsky appeals from a judgment of the United States District Court for the Eastern District of New York, David G. Trager, *Judge*, dismissing her complaint against the Commissioner of Jurors for Kings County, New York, seeking an injunction against the selection of potential jurors from voter registration lists, on the ground that that practice constitutes an impermissible burden on the right to vote, in violation of 42 U.S.C. § 1973i(b) (1994), the Equal Protection Clause of the Fourteenth Amendment, and the Twenty-Fourth Amendment. In her complaint or in an affidavit, Bershatsky asserted principally that "[s]erving jury duty is economically disadvantageous to people," that she "wish[ed] to vote at the next general election without the knowledge that that could cause [her] to be selected for jury duty," and that the prospect of being called for jury duty was "coerc[ive]" and "intimidat[ing]," and could "discourage[ ]" people from voting.

The district court, in a Memorandum and Order dated January 30, 1996, published at 920 F. Supp. 38, dismissed the complaint for failure to state a claim, noting, *inter alia,* that although a citizen's right to vote is fundamental, *see Harper v.*

*Virginia Board of Elections*, 383 U.S. 663 (1966), governments have compelling need to adopt jury selection systems that are designed to ensure a fair cross-section of the community in the jury venire, *see* 920 F. Supp. at 40-41, and " 'jury duty should be regarded as a patriotic service[;] . . . all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship,' " *id.* at 39 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 231 (1946) (Frankfurter, J., dissenting) (internal quotation marks omitted)). We affirm substantially for the reasons stated in the district court's opinion.

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. Southern Pacific Co.*, 328 U.S. at 220; *see also Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). Governments have an obligation to adopt a system of calling potential jurors that does "not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538.

The district court noted that, for the summoning of potential jurors in the federal courts, Congress has indicated that the use of voter registration lists is the preferred method. *See* 28 U.S.C. § 1863(b)(2) (1994). "The use of voter registration lists was chosen by Congress in part because it provided each qualified citizen with an equal opportunity to cause his name to be among those from which random selection is made, and . . . it [i]s the largest generally available random source that [i]s frequently updated." *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir.) (en banc) (internal quotation marks omitted), *cert. denied*, 487 U.S. 1205 (1988); *see* H.R. Rep. No. 1076, 90th Cong., 2d

Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1794. And, as the use of voter registration lists is generally the most effective means of obtaining a jury venire representative of the citizens of a community, this method of selecting potential jurors has been upheld in the face of constitutional challenges by litigants whose cases have been decided by juries. *See, e.g., Schanbarger v. Macy*, 77 F.3d 1424, 1424 (2d Cir. 1996) (per curiam) (upholding use of voter registration lists as source of names for civil jury venire); *United States v. Ashley*, 54 F.3d 311, 314 (7th Cir.) (same in criminal case), *cert. denied*, 116 S. Ct. 232 (1995); *United States v. Lewis*, 10 F.3d 1086, 1090 (4th Cir. 1993) (same).

We agree with the district court that these principles are equally applicable to jury selection in the state courts. Athough alternative lists, such as lists of licensed drivers and of individuals who have filed tax returns, can be and have been used as an additional source, they are, as the district court noted, both overinclusive, as they may include noncitizens, and underinclusive, as they likely will not include citizens whose income levels do not require the filing of tax returns and who do not drive. Only citizens are allowed to serve on juries; only citizens are allowed to vote. A call to jury duty, to fulfill one's responsibility as a citizen, does not constitute coercion or intimidation within the meaning of 42 U.S.C. § 973i(b). Protection of a citizen's right to vote, especially freed from the civic responsibility to serve as a juror, does not justify depriving a government of the jury-pool selection method that has generally proven the most effective means of pursuing the compelling interest of achieving a reasonably representative venire.

*Appendix A*

We have considered all of Bershatsky's contentions on this appeal and have found them to be without merit. The complaint seeking to preclude the use of voter registration lists to summon potential jurors was properly dismissed. The judgment of the district court is affirmed.

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK DATED JANUARY 30, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-95-4121(DGT)

ABBE BERSHATSKY,

Plaintiff,

-against-

WILBUR A. LEVIN, COMMISSIONER OF JURORS, KINGS COUNTY, NEW YORK

Defendant.

MEMORANDUM AND ORDER

TRAGER, District Judge:

This is an action brought by plaintiff, Abbe Bershatsky, for injunctive relief and a declaratory judgment that defendant, Wilbur A. Levin, Commissioner of Jurors, cannot use voter registration lists as a method for selecting jurors because it infringes upon her right to vote. Before the court is plaintiff's motion for a preliminary injunction and defendant's cross-motion to dismiss.

### Background

Bershatsky, a citizen of the United States and the State of New York, is registered to vote in Kings County. Affidavit of

*Appendix B*

Abbe Bershatsky, Ex. A of Compl. at ¶ a. She explains that she received a juror questionnaire which stated that her name had been randomly selected from one of three lists, one of which is the Board of Elections Voter Registration List. The others are a list of filers of state income tax returns as well as a list of licensed drivers. *Id.* at ¶ b. She further states that she returned the questionnaire, *Id.*, and was called for jury duty on October 16, 1995. *Id.* at ¶ h. She also notes that she has a paying day job which is closer to her home than the court and that she has an elderly father at home with her. *Id.* at ¶ e. Finally, she states that "I wish to vote at the next general election without the knowledge that that could cause me to be selected for jury duty." *Id.* at ¶ d.

In plaintiff's complaint, she alleges that several lists are used in order to select the jury pool and that there is no attempt to eliminate duplications from the several lists. Compl. at ¶¶ 5-6. However, she refuses to establish that she has been called for jury duty on more than one occasion. According to plaintiff: "People are intimidated or coerced from voting or from registering to vote by the practice of selecting people for jury duty from voter registration rolls." Aff. of Abbe Bershatsky at ¶ 2. Furthermore, she alleges that "[s]erving jury duty is economically disadvantageous to people." *Id.* at ¶ 12. And, "[p]eople who register to vote in a federal election believe they increase the probability of being called for jury duty." *Id.* at ¶ 13.

Consequently, she maintains that it is "illegal and unconstitutional for defendants to select people for jury duty from voter registration rolls." Compl. at Wherefore Clause, ¶ 1. According to plaintiff, "a citizen must choose between voting or decreasing the probability of a service he or she may consider onerous." Pltf's Memo. of Law at 2.

*Appendix B*

**Discussion**

Plaintiff's claim that the use of the voter registration list from which to select a jury interferes with one of her fundamental rights as a citizen overlooks the fundamental duty of a citizen. According to Justice Frankfurter, "jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 231 (1946).

Furthermore, "[j]ury duty is the only time today when the government asks someone to give up his or her private pursuits to serve it. Although we have a military draft, no one is called today. It is true that at times such service is highly inconvenient to employees and employers, but the maintenance and independence of the judiciary must be protected and can only be protected by protecting the rights of those who are called upon to serve as jurors. Jury service is a duty and a right of citizenship . . ." *In re Grand Juror Webb*, 586 F. Supp. 1480, 1483 (N.D. Ohio 1984). Consequently, plaintiff's claims of inconvenience and financial hardship are not acceptable reasons for not serving jury duty.

Plaintiff's assertions that jury duty violates her right to vote and is economically burdensome also ignore the fundamental importance of ensuring that jurors are drawn from as broad a cross-section of the society as possible. A jury is "a body truly representative of the community, composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Carter v. Jury Commission of Greene Cty.*, 396 U.S. 320, 330 (1970).

*Appendix B*

Many courts have found that the use of voter registration lists is appropriate in order to provide a fair cross-section of the community. *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir.) *cert. denied*, 487 U.S. 1205 (1988); *see also United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993) (upholding the use of voter registration lists for jury selection).

In fact, Congress has stated that voter registration lists are the preferred source of names for prospective jurors because they ensure a fair cross-section of the community. *See* The Jury Selection Act, 28 U.S.C. § 1863(b)(2) (1988). "The use of voter registration lists was chosen by Congress in part because it provided each qualified citizen with an equal opportunity to cause his name to be among those from which random selection is made, and also because it was the largest generally available random source that was frequently updated." *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988) citing H. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1792. More recently, citing two of its prior decisions, the Seventh Circuit, in *United States v. Ashley*, 54 F.3d 311, 314 (7th Cir. 1995), reaffirmed the use of voter registration lists as the source of names for jury venires. *See also, United States v. Lewis*, 10 F.3d 1086, 1090 (4th Cir. 1993) (upholding the use of voter registration lists in order to provide potential jurors). Consequently, there is ample justification for using the voter registration list in selecting a jury.

Defendant casts this argument as a challenge to New York's Judiciary Law § 506 which states:

> The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and

> from such other available lists of the residents of the county . . .

He maintains that "§ 506 does not infringe upon a fundamental right nor does it involve a classification of persons who receive special constitutional protection." Def's Mem. at 4. Therefore, according to defendant, Judiciary Law § 506 is entitled to receive minimal judicial scrutiny and must be upheld so long as there is a rational relationship between the statute and any legitimate interest of government. *Reno v. Flores*, 113 S. Ct. 1439, *on remand*, 992 F.2d 243 (9th Cir. 1993); *Federal Communications Commission v. Beach Communications, Inc.*, 113 Ct. 2096, *on remand*, 10 F.3d 811 (D.C. Cir. 1993). However, this reasoning is faulty since if we accept the allegations of the complaint as true, as we must, that the statutory scheme is burdening plaintiff's fundamental right to vote.

The right to vote is a fundamental right. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Legislative classifications must be strictly scrutinized and are unconstitutional absent a compelling governmental interest. Generally, the right at stake in a case involving a fundamental right to vote is the right to equal participation in governmental and societal decision-making.

However, even fundamental rights constitutionally can be infringed upon in some ways. For instance, a state or municipality can restrict the right to vote to its residents. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Although non-residents may be interested in what a state or municipality does, territory is accepted as the best means of drawing a boundary. *Id.* In *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978), the court stated: "a government unit may legitimately restrict the right to

participate in its political processes to those who reside within its borders." *Id.* at 68.

Thus, just as restricting the voting right to those who live within a particular territory is acceptable, so, too, is putting one's name in the jury selection pool — if this can be considered a restriction on one's voting right. So too, here, Congress has determined that the most efficient method to obtain a jury representative of the community is to use voter registration lists as part of the selection process. And there is no reason to think that a similar judgment by the New York State Legislature is open to question. Using the voter registration list has, according to Congress and common sense, been lauded as both efficient and fair in its ability to provide a cross-section of the community. The fact that other alternatives exist under which plaintiff would not bear this burden does not make the burden on plaintiff's right to vote unconstitutional. In fact, the alternative lists used by the State present serious problems of both overinclusiveness and underinclusiveness as well as accuracy. The drivers' license list includes large numbers of non-citizens, and the tax list has the additional problem that many low income citizens are not required to file for various reasons. Thus, even applying a strict scrutiny test, New York's need to have a workable program of ensuring that a fair cross-section of the population is within the jury selection pool establishes a compelling interest that justifies the use of the voter registration list as one source for creating its jury pool.

Finally, along with the benefits of citizenship, must come the burden of meeting one of the principal obligations of citizenship in the United States. Indeed, the court is at a loss to understand why Congress and the States cannot make an unjustified failure of a citizen to meet his or her civic obligation

to serve on a jury a basis for denying that citizen of his or her right to vote.[1] The *Harper v. Bd. of Elections*, 383 U.S. 663 (1966), line of cases, relied upon by plaintiff here involve a quite different issue. There, the poll tax was being used to reduce the voting lists of minorities and the economically disadvantaged. Here, the end sought to be achieved by restricting the right to vote would be getting citizens to perform their civic obligations of jury service — a most worthy end. The court does not see how the plaintiff has suffered a constitutional injury or that the relevant state statute is unconstitutional. Selecting people for jury duty from a master list comprised of, among other things, a voter registration list does not violate one's fundamental right to vote nor does it impose any other unconstitutional hardship.

**Conclusion**

Accordingly, defendant's motion to dismiss must be granted and plaintiff's request for a preliminary injunction must be denied. The Clerk of the court is directed to enter judgment for the defendant and close the case.

Dated: Brooklyn, New York
January 30, 1996

SO ORDERED:

s/ David G. Trager
David G. Trager
United States District Judge

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1. Certainly, Congress or the States could make it a crime to willfully and unjustifiably refuse to appear for jury service. And, were a person convicted of a felony for doing so, he or she might well lose their right to vote. I cannot see why Congress or the States cannot do directly what they may achieve indirectly.

## APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 27, 1997

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**UNITED STATES COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

**GEORGE LANGE III**
**CLERK**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27 day of January one thousand nine hundred and ninety-seven.

Dkt No: 96-7238

Bershatsky

Plaintiff-Appellant

v

Levin

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Abbe Bershatsky.

*Appendix C*

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: Arthur M. Heller
Arthur M. Heller
Administrative Attorney

## APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

### The United States Constitution

Article I, Section 4, Paragraph 1: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing Senators.

Article VI, Paragraph 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV, SECTION 1, Sentence 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Appendix D*

AMENDMENT XXIV, SECTION 1: The rights of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or by any State for failure to pay any poll tax or other tax.

**New York Statutes**

Civil Practice Law and Rules, Section 4105: The first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.

Criminal Procedure Law, Section 270.15, part 2, last two sentences: The prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors. They must be sworn to try the action in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence.

Election Law, Section 5-400. 1: A voter's registration shall be cancelled if, since the time of his last registration, he: 1. Failed to vote, during any five year period which ends in a year in which electors of president and vice president of the United States are elected, in at least one general, special or primary election or village election conducted by the board of elections.

Judiciary Law, Section 506: The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and from such other

available lists of the residents of the county as the chief administrator of the courts shall specify, such as lists of utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving aid to dependent children, medical assistance or home relief, persons receiving state unemployment benefits and persons who have volunteered to serve as jurors by filing with the commissioner their names and places or residence.

**Federal Regulations**

28 CFR Appendix to Part 51: JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The applicable date is the date that was used to determine coverage and the date after which changes affecting voting are subject to the preclearance requirement.

Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under section 4(b).

| Jurisdiction | Applicable Date | FEDERAL REGISTER citation Volume and page | Date |
|---|---|---|---|
| * * * | | | |
| New York: | | | |
| * * * | | | |
| Kings County | Nov. 1, 1968 | 36 FR 5809 | Mar. 27, 1971. |
| Kings County | Nov. 1, 1972 | 40 FR 43746 | Sept. 23, 1975. |
| * * * | | | |

## *Appendix D*

28 CFR Appendix to Pt. 51 refers to the following provision of the United States Code:

42 U.S.C. 1973b (b), Para. 1: . . . On and after August 6, 1975, in addition to any State or political subdivision of a State, determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of a subsection (a) shall apply in any State or any political subdivision of a State which (i) The Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

# APPENDIX E — ELECTORAL PARTICIPATION AND NON-PARTICIPATION IN NEW JERSEY

## ELECTORAL PARTICIPATION AND

## NON-PARTICIPATION IN NEW JERSEY

Prepared for:

New Jersey Department of State
Election Division

Prepared by:

The Eagleton Poll
The Eagleton Institute of Politics
Rutgers — The State University

April 1981

*Appendix E*

TABLE 3

MAIN REASON GIVEN FOR NOT BEING REGISTERED TO VOTE

| | Percent | Number | |
|---|---|---|---|
| Ineligible* | 33% | 39 | |
| No interest in politics | 26 | 31 | |
| Distrust politics/no choice | 14 | 16 | |
| To avoid jury duty | 6 | 8 | |
| Too busy/too much "red tape" | 6 | 6 | |
| Poor health | 4 | 5 | |
| Religious reasons | 4 | 5 | |
| Don't know how to register | 3 | 3 | |
| "Laziness" | 2 | 2 | |
| No reason/I don't know | 2 | 3 | |
| | 100% | 118 | Total |

* About two-thirds of these respondents (24) mentioned specifically a recent change of address as the reason why they were ineligible.

## APPENDIX F — PORTION OF ARTICLE FROM THE LOS ANGELES TIMES DATED SUNDAY, JANUARY 9, 1977 (Part I, page 7)

### WHY THEY DIDN'T VOTE

* * *

When those who failed to register were asked why, they responded as follows (Some gave more than one answer):

| | |
|---|---|
| **General apathy or disinterest (too busy, didn't get around to registering, moved, changed address, lazy, forgot)** | **58%** |
| **Don't believe, little or no faith in political system** | **26** |
| **Don't understand politics, don't know enough about it** | **9** |
| **Don't want to be called for jury duty** | **5** |
| **Illness, in hospital** | **3** |
| **All other mentions** | **13** |

* * *